

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF REALTY REGULATION
STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT,
24.101.413 renewal dates and requirements,)	ADOPTION, AND REPEAL
24.210.301 definitions, 24.210.401,)	
24.210.410 through 24.210.412, 24.210.416,)	
24.210.426, and 24.210.430 general)	
provisions, 24.210.601, 24.210.602,)	
24.210.610, 24.210.611, 24.210.615,)	
24.210.616, 24.210.624, 24.210.625,)	
24.210.629, 24.210.635, 24.210.641,)	
24.210.646, 24.210.651, 24.210.660,)	
24.210.661, 24.210.667, 24.210.674, and)	
24.210.677 brokers and salespersons,)	
24.210.805, 24.210.807, 24.210.809,)	
24.210.812, 24.210.818, 24.210.825,)	
24.210.826, 24.210.828, 24.210.835,)	
24.210.840, and 24.210.843 property)	
management, the adoption of NEW RULE I)	
inactive status, and NEW RULE II continuing)	
education, the repeal of 24.210.405 application)	
of rules, 24.210.435 investigations committee,)	
24.210.603 application for examination,)	
24.210.621 nonresident license, 24.210.815)	
application for examination, and 24.210.836)	
continuing education)	

TO: All Concerned Persons

1. On April 12, 2007, the Department of Labor and Industry (department) and the Board of Realty Regulation (board) published MAR Notice No. 24-210-29 regarding the amendment, adoption, and repeal of the above-stated rules, at page 407 of the 2007 Montana Administrative Register, issue no. 7.

2. On May 3, 2007, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. Several comments were received by the May 11, 2007, deadline.

3. The department and board have thoroughly considered the comments and testimony received. A summary of the comments received and the department's and board's responses are as follows:

COMMENT 1: Several commenters supported the proposed rule amendments stating that the changes are long overdue and will better facilitate licenses and the public.

RESPONSE 1: The board acknowledges the comments.

COMMENT 2: One commenter opposed annual license renewals and continuing education for real estate brokers and salespersons, claiming the change would increase the administrative burden on both board and staff. The commenter listed several problems such as a huge one-time influx of renewal applications, receipt of all renewal fees in a short period of time, doubling the time and cost for preparation and mailing by sending renewal notices, applications, and renewed licenses annually, and doubling the licensee's required paperwork. The commenter suggested a biennial renewal and a biennial continuing education requirement with staggered renewal dates throughout the year.

RESPONSE 2: The board decided to align the renewal and continuing education dates to address licensees' difficulties with annual continuing education and biennial renewal requirements. Most licensees are now renewing via the Internet which requires less staff attention and lessens the administrative burden. The department has determined that a set renewal date is more manageable and more beneficial for licensees and the department.

COMMENT 3: One commenter stated that ARM 24.210.301(13) is misleading and confusing because including an applicant as a "licensee" could lead someone to believe that an applicant can do all of the things that a licensee can do under the rules.

RESPONSE 3: The board disagrees with the commenter's interpretation of the definition. The board notes that currently a statute exists prohibiting someone from performing any licensed activity without properly obtaining a license.

COMMENT 4: One commenter questioned whether several property manager license fees were missing from ARM 24.210.401 in the notice.

RESPONSE 4: The property management fees are located in a different rule at ARM 24.210.801 but are not amended or included in this rule notice.

COMMENT 5: One commenter indicated a potential conflict between (1) and (3) of ARM 24.210.426 in that (1) appears to make it mandatory to use trust accounts while (3) suggests that trust account use is permissive. The commenter further opined that the rules task force intended a permissive use.

RESPONSE 5: The board agrees with the comment and is amending the rule accordingly.

COMMENT 6: One commenter stated that the current and proposed amended rules seem to address two distinctly different business endeavors, sales versus management of real property. Regarding ARM 24.210.426(1) the commenter stated that brokerage companies that only sell real property, and have a third-party hold

client funds, should not be required to maintain a trust account. The commenter suggested amending (1) to read "Should a brokerage have written policies in place that preclude all property management activities and the maintenance of an in-house trust account, and if the brokerage policies also clearly indicate that all client funds, i.e., earnest money, are to be deposited with a recognized closing agent as the designated holder of the funds, no trust account is required to be maintained."

RESPONSE 6: The board agrees with the comment and is amending the rule to clarify that the maintenance of a trust account is not mandatory but if a broker uses a trust account, they must comply with the maintenance rules.

COMMENT 7: A commenter suggested the board include in rule the types of third-party business entities (title companies, banks, credit unions, etc.) acceptable as recognized closing agents and the requirement to receive and maintain in the transaction files receipts and other documentation regarding earnest money.

RESPONSE 7: The principals to a transaction determine who will hold the earnest money, not the board. The principals must agree to have someone hold the earnest money and the board lacks authority to dictate such requirements to nonlicensees.

COMMENT 8: One commenter stated that ARM 24.210.426(3)(d) only addresses situations where it is presumed that the client's funds have first been deposited in a brokerage trust account and then moved to a closing agent's trust account. The commenter suggested the board amend (3) to acknowledge the permissive nature of brokers maintaining trust accounts.

RESPONSE 8: The board determined that amending this rule to clarify a broker does not need to maintain a trust account addresses the concerns in this comment.

COMMENT 9: A commenter expressed concern that the amendments to ARM 24.210.426(3)(d) would remove a broker's ability to withdraw money from a trust account in advance of the termination or consummation of the transaction following a signed written agreement by the buyer and seller. The commenter described the practice where real estate agents retaining earnest money deposits in their trust accounts provide in the buy-sell agreement for the use of earnest money to pay fees and costs to file an interpleader action in an earnest money dispute. The commenter suggested amending (6)(d) to read "However, trust funds may be disbursed to the closing agent in anticipation of closing or to the broker in advance of the termination or consummation of the transaction upon written agreement of the buyers and sellers. The broker must account for trust account funds at all times."

RESPONSE 9: The board considered the comment and at this time is amending the rule to address issues raised in other comments. The board will include this issue in future rule review discussions.

COMMENT 10: One commenter suggested amending ARM 24.210.426(6) to acknowledge and clarify that real estate companies that are sales brokerages, not

property managers, can deposit earnest money funds in a brokerage trust account, or deliver them to a third-party designated holder of the funds.

RESPONSE 10: The board agrees the proposed language is not clear and is amending the rule accordingly to eliminate the apparent confusion.

COMMENT 11: A commenter stated that the proposed language in (1) of ARM 24.210.610 is cumbersome and suggested changing "applicant" to "person."

RESPONSE 11: The proposed language is consistent with terminology usage throughout the rules, thus the board is amending (1) exactly as proposed.

COMMENT 12: One commenter stated that ARM 24.210.611(5)(b) has never worked and still doesn't think it will work. The commenter believes brokers don't understand the section or it is not serious enough and needs to be strengthened.

RESPONSE 12: The rule implements the statutory requirement that an application for a sales license is accompanied by the recommendation of the licensed broker certifying the applicant is of good repute and will be actively supervised. The board has a disciplinary process in place when a broker fails to meet the supervisory obligations.

COMMENT 13: In reference to ARM 24.210.611(6)(b)(i) a commenter stated that out of state licensees from other jurisdictions should have to document the number of transactions.

RESPONSE 13: Out of state licensees are required to document their transactions before receiving a broker license unless they are applying for a broker license in Montana by reciprocity.

COMMENT 14: In reference to ARM 24.210.611(6)(c) a commenter requested that people given a Montana broker license are required to have the same number of transactions as Montana brokers.

RESPONSE 14: Montana requires all broker applicants to meet the same activity level unless they are being licensed by reciprocity from those jurisdictions where Montana has entered into a reciprocal agreement.

COMMENT 15: A commenter asserted a conflict exists between the preceding 18-month licensure requirement in ARM 24.210.615(1) and 37-51-302(2)(c), MCA, which requires active engagement as a salesperson for two years.

RESPONSE 15: The statute requires an applicant to have been actively engaged as a licensed real estate salesperson for two years or have equivalent experience or education to obtain a broker license. The amendment to (1) addresses the equivalent means of obtaining a broker license and the board finds no conflict.

COMMENT 16: Two commenters suggested not changing "experience qualifications" to "transaction requirements" in ARM 24.210.616(1), since the change is confusing, unnecessary, and would further tie the board's hands.

RESPONSE 16: The board agrees with the comment and is considering alternative amendments to this rule. The board is not amending the rule at this time.

COMMENT 17: In reference to ARM 24.210.629 a commenter expressed concern in dealing with brokers licensed via reciprocity not knowing Montana laws, including applicable water law, and suggested such a requirement for reciprocity licensees.

RESPONSE 17: The board acknowledges the comment but it is outside the scope of this rule notice.

COMMENT 18: One commenter opined that the conflict of interest in ARM 24.210.641(2) pertains to listing agents buying their own listing and buyer agents selling personally owned property to their clients. The commenter suggested the proposed new language be deleted from (2) since the board is currently drafting rules to address this specific conflict of interest and the proposed language is vague.

RESPONSE 18: The board agrees with the comment and is amending the rule accordingly.

COMMENT 19: One commenter suggested adding examples of transactions that are not real estate transactions to clarify ARM 24.210.641(3).

RESPONSE 19: Following discussion, the board decided to not add (3) to this rule as proposed.

COMMENT 20: A commenter questioned the reason for new language proposed at ARM 24.210.641(3) and expressed concern as to the vagueness of the language and the potential for misinterpretation.

RESPONSE 20: Following discussion, the board decided to not add (3) to this rule as proposed.

COMMENT 21: One commenter suggested that (6)(t) of ARM 24.210.641 is unnecessary following the enactment of Senate Bill 319.

RESPONSE 21: The board agrees that the new language is no longer necessary following the 2007 legislative session and is not adding this subsection to the rule.

COMMENT 22: One commenter stated the new language being added to ARM 24.210.641(6)(aa), "This does not prohibit a buyer's broker from reducing commissions received and is not considered payment to an unlicensed person" is unclear, is not what the rules task force and board intended, and may be misinterpreted.

RESPONSE 22: The board agrees the rule as noticed is unclear and is amending the rule accordingly.

COMMENT 23: A commenter opposed the amendment to ARM 24.210.641(6)(aa) stating that he offers buyers incentives because they are producing the money to make a transaction work. The commenter asserted that seller's agents can offer to work for whatever compensation is wanted, but if some of the commission is returned to the party that produces the capital to make the transaction work, it is considered unprofessional conduct. The commenter states that the proposed change is unnecessary, doesn't allow for the free enterprise system to work, and would have a major negative impact on his approach used. The commenter also questioned the purpose of the proposed change.

RESPONSE 23: The board discussed this comment at length. Through the proposed amendment, the board is attempting to further clarify 37-51-321(1)(p), MCA, that considers a licensee paying a commission in connection with a real estate sale or transaction to a person who is not licensed as a real estate broker or real estate salesperson grounds for license discipline.

COMMENT 24: Regarding ARM 24.210.677(5), one commenter asked what is meant by needing approval for "each topic" and suggested that instructors should only have to pay \$50 per different topic and not per course.

RESPONSE 24: Currently an instructor pays one fee to make application and may include a number of topics on a single application. Instructors do not make application for each course, nor will they be required to do so. The fee covers the cost of reviewing the entire instructor application.

COMMENT 25: A commenter suggested the board be more aggressive in its responses to alleged transgressions, even though specific sanctions are not part of the rule changes.

RESPONSE 25: The board acknowledges the comment, but the suggestion is outside the scope of this rule notice.

4. The department has amended ARM 24.101.413 exactly as proposed.

5. The board has amended ARM 24.210.301, 24.210.401, 24.210.410 through 24.210.412, 24.210.416, 24.210.430, 24.210.601, 24.210.602, 24.210.610, 24.210.611, 24.210.615, 24.210.624, 24.210.625, 24.210.629, 24.210.635, 24.210.646, 24.210.651, 24.210.660, 24.210.661, 24.210.667, 24.210.674, 24.210.677, 24.210.805, 24.210.807, 24.210.809, 24.210.812, 24.210.818, 24.210.825, 24.210.826, 24.210.828, 24.210.835, 24.210.840, and 24.210.843 exactly as proposed.

6. The board is not amending ARM 24.210.616 at this time.

7. The board has amended ARM 24.210.426 and 24.210.641 with the following changes, stricken matter interlined, new matter underlined:

24.210.426 TRUST ACCOUNT REQUIREMENTS (1) ~~The designated broker shall maintain a trust account and maintain the records required by this rule. Offices or firms having more than one broker may utilize a single trust account.~~

(2) A broker may delegate authority for maintenance of a trust account to a designated broker with whom the broker is employed or associated. Delegation shall not relieve either broker from responsibility for any failure to comply with these trust account requirements whether by the delegating broker or the designated broker.

(2) (3) Broker trust accounts may be maintained in interest-bearing accounts with the interest payable to the broker, principal, third-party, or any other person, as may be designated by agreement. Interest payable to the broker shall be identified by agreement as consideration for services performed.

(3) (4) If a broker elects to hold trust funds ~~use a trust account to hold trust fund deposits~~, the broker must comply with the following:

(a) through (n) remain as proposed.

(4) through (8) remain as proposed but are renumbered (5) through (9).

24.210.641 UNPROFESSIONAL CONDUCT (1) remains as proposed.

(2) A licensee shall not act as an agent for a party or parties in a real estate transaction where that agency representation conflicts with the obligations owed by the licensee to another party. This does not prohibit dual agency as permitted in 37-51-313, MCA, ~~except where there is a conflict of interest or the appearance of a conflict of interest.~~

(3) ~~A licensee shall not cause or allow another person to rely on the licensee's status as a licensee in any transaction that is not a real estate transaction.~~

(4) through (6)(s) remain as proposed but are renumbered (3) through (5)(s).

(t) ~~failing to disclose in writing to both principals that the agent is involved in competing offers if a buyer's broker has two principals making offers on the same property;~~

(u) through (z) remain as proposed but are renumbered (t) through (y).

(aa) (z) paying consideration in connection with a real estate sale or transaction to a person who is not licensed as a real estate broker. Reducing the commission owed by the principal who pays the commission is not considered payment of a commission to an unlicensed person. ~~This does not prohibit a buyer's broker from reducing commissions received and is not considered payment to an unlicensed person.~~ Licensees may not solicit business by offering gifts, rebates, or promotional items;

(ab) through (ae) remain as proposed but are renumbered (aa) through (ad).

(7) remains as proposed but is renumbered (6).

8. The board has adopted NEW RULE I (24.210.827) and NEW RULE II (24.210.829) exactly as proposed.

9. The board has repealed ARM 24.210.405, 24.210.435, 24.210.603, 24.210.621, 24.210.815, and 24.210.836 exactly as proposed.

BOARD OF REALTY REGULATION
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Certified to the Secretary of State August 27, 2007